No. 20269

In the

United States Court of Appeals

For the Ninth Circuit

ESTATE OF JOSEPH L. HASKINS, Deceased,)
LLOYD L. EDWARDS and JAYNE C. HASKINS,)
EXECUTORS,)
)
Appellant,)
)
-vs-)
)
UNITED STATES OF AMERICA,)
)
Appellee.)

On Appeal from the United States
District Court for the
Northern District of
California,
Southern Division

APPELLANT'S REPLY BRIEF

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STATEMENTS OF THE CASE COMPARED

There is no significant difference in the facts as presented by Appellant and Appellee. Appellee does not admit directly that Joseph Haskins received a disproportionately large share of the community

property. (Br. 8.)[1/] It does so indirectly. ("The District Court recognized that decedent received a greater share in the community property than his wife." Br. 10).

More important, however, Appellee amdits the fundamental premise upon which this appeal is based. That premise is a fact which the District Court failed entirely to consider: namely, that the Haskins property settlement agreement

> ". . . required the husband to dispose of $100,000 in community assets . . . by establishing an irrevocable trust in which he could reserve the income to himself for life, remainder to the children . . . ."
> (Br. 5, emphasis supplied.)

ARGUMENT

Appellee's argument is devoted entirely to explaining why Mildred's transfer of valuable property pursuant to the divorce settlement agreement was not consideration for the transfer of property

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1/ "Br." is used throughout to refer to Appellee's Brief.

Joseph was required to make under the same agreement. Appellee's arguments speak around the point, but not to it. Each one is examined in turn below.

I

Appellee argues that the Home Ranch Trust could not have been bargained for by Mildred because it gave Joseph the equivalent of outright ownership. (Br. 16-18).

In fact, Mildred bargained for the protection of the property in the Home Ranch Trust from dissipation by Joseph, and she got what she bargained for. The property settlement agreement required Joseph to make a transfer to or for the benefit of the children. (R. 15, 16; set out in Appellant's Opening Brief 16, 17). The terms of the Trust instrument itself do not detract from this obligation in any way. (Quoted in Br. 17). Joseph Haskins was not "in substance" the owner of the assets in the Home Ranch Trust. He possessed a life estate and a power to invade principal for his "care, maintenance and support . . . including all of his needs occasioned or incurred by reason of sickness, accident, hospitalization or other emergency." (R. 26-27). This power is limited by an ascertainable standard, and therefore cannot

be equated with ownership. Such a power is not a Section 2038 power and would not make the subject property taxable in the estate of the transferor holding that power. Jennings v. Smith, 161 F.2d 74 (2d Cir., 1947); Estate of Wier, 17 T.C. 409 (1951), Acq. 1952-1 Cum. Bull. 4.

The existence of an ascertainable standard for the power retained by the grantor makes the transfer of the remainder to the children complete for gift tax purposes except to the extent of the ascertainable value of the grantor's rights. Regs. Section 25.2511-2(b). However, in this case, completeness for gift tax purposes was irrelevant, because the Home Ranch Trust was created for a bargained-for consideration flowing from Mildred Haskins, and not by way of gift from Joseph. Every obligation in the property settlement agreement was consideration for every other promise, for the agreement must be construed as a whole. Janise v. Janise, 195 Cal. App. 2d 433, 15 Cal. Rptr. 742(1961).

II.

Even so, states Appellee, the Home Ranch Trust was created for estate planning purposes, and not because Mildred

bargained for it. (Br. 12-16).

By this construction of the Agreement, Appellee would make Joseph's promise unenforceable under California law, as a promise to make a gift. Fritz v. Thompson, 125 Cal. App. 2d 858, 863, 271 P.2d 205, 208 (1954). This is inconsistent with Appellee's own admission. Appellee itself stated that Joseph was required to set up the Home Ranch Trust under the terms of the property settlement agreement. Appellee is correct in its statement of the law applicable to property settlement agreements. They are specifically enforceable. Sonnicksen v. Sonnicksen, 45 Cal. App. 2d 46, 113 P.2d 495 (1941). However, promises contained in property settlement agreements are enforceable only because they are supported by consideration.

The only estate planning purpose served by creation of the Home Ranch Trust was Mildred's purpose: the protection of the assets in the trust from dissipation by Joseph. What estate planning purpose of Joseph's does Appellee have in mind? Joseph would have saved both trouble and expense by retaining the property until his death and transmitting it to his children by

way of a will. He was paid for making transfers to the children and the value of what he received was consideration for purposes of both gift and estate taxes. Estate of Lillian B. Gregory, 39 T.C. 1012, 1020 (1963); Commissioner v. Siegel, 250 F. 2d 339 (9th Cir., 1957), Acq. 1964-2 Cum. Bull. 7. To the extent of the value of such consideration, the property subject to gift and estate tax is reduced without any necessity for a trust. Regs. Section 20.2053-4.

III

But, says Appellee, even though valuable property was given for Joseph's creation of the Home Ranch Trust, the remainder was actually a gift from Joseph to the children. (Br. 18-23).

Where is the evidence that Joseph would have tied up this property in an inter vivos trust, without the compulsion of his agreement with Mildred? Joseph could have done more for his children by transferring $100,000 in community property directly to them, or by giving them all or part of the income from this property, as he had a right to do under the property settlement agreement (R. 15, 16). Instead, he chose to make the minimum inter vivos transfer required by the

Agreement (R. 26). Evidence that he loved his children cannot of itself make Joseph's creation of the trust a gift (United States v. Past, 347 F. 2d 7 (9th Cir., 1965)), nor could it unless the Court is willing to enunciate the rule that only transfers to the objects of enmity are to be treated as transfers for consideration. But cf. Harris v. Commissioner, 340 U.S. 106 at 112, 71 S.Ct. 181, 95 L. Ed. 111 (1950).

Appellee attempts to distinguish the decision of this Court in United States v. Past, supra, on the ground that there the trust was set up for the benefit of the wife, while here it was set up for the benefit of the children. But, both the Past trust and the Haskins trust had remainders to the children of the divorced couple. And both gave a spouse a life estate. Yet Appellee argues that the Past trust was for a statutory consideration, but the Home Ranch Trust was donative in character. (Br. 16, 24-25). The cases differ in only two respects: The Past case involved what the parties thought to be an equal division of community property, and the wife was made life tenant. The Haskins case involved an unequal division of community property

favoring the life tenant who was the husband. If anything, the facts now before this Court are more compelling than they were in Past, that valuable consideration was given and received for the transfer in trust.

IV

Finally, states Appellee, if Joseph received consideration for the children's remainder in the Home Ranch Trust, it was nothing more than Mildred's creation of a similar trust. Such consideration has no value for estate tax purposes. (Br. 24-28).

Appellee's argument is contrary to California law that every obligation in a property settlement agreement is consideration for every other obligation, because the agreement must be construed as a whole. Janise v. Janise, supra.

Appellee's argument is contrary to the facts as demonstrated by its own counsel on cross-examination. Counsel for Mildred testified that she was willing to put her share of the community property in trust to make it easier for Joseph to agree to the trust. (Tr. 45). He testified that Joseph thought Mildred ought to be required to put up a trust "if

he had to . . ." put one up. (Tr. 45, emphasis supplied). Where is Appellee's evidence that these trusts were created solely in consideration of each other? Appellee's cross-examination demonstrates that these trusts were only what they appeared to be: namely, part of an integrated bargained-for whole. Nothing was superimposed upon the property settlement agreement by the creation of the trusts. The creation of each trust was required by that agreement, and Joseph's trust, here in question, was supported by valuable consideration paid to him.

CONCLUSION

No argument and no interpretation of the facts can explain why Mildred's transfer of valuable property under a property settlement agreement is not consideration for the transfer of property Joseph was required to make by the same agreement.

No depletion of Joseph's estate was contrived by the Haskins property settlement agreement. His estate was in fact increased by the community property he received outright, in excess of the one-half to which he was entitled. There is no reason why it should be further swelled by the inclusion of property he was

required to transfer to others to get that excess community property. If, as Appellee says (Br. 19), Sections 2036 and 2043 of the Code are designed to keep a grantor's estate from being depleted tax-wise, there can be no justification for the application of Section 2036 to the Home Ranch Trust.

The Court below thought erroneously that "gifts" to one's children of a remainder interest under a trust could not be "paid for" by the other parent for estate tax purposes. Such is not the case, either for gift or estate tax purposes. Consideration means the same thing for both the gift and the estate tax. Estate of Lillian B. Gregory, [holding a wife's transfer to the children of a remainder interest in her 1/2 of the community property in exchange for a life estate in her husband's 1/2 to be for a valuable consideration for estate tax purposes]; Commissioner v. Siegel, 250 F.2d 339 (9th Cir., 1957) Acq. 1964-2 Cum. Bull. 7 [holding a wife's election to waive her interest in community property under her husband's will to be a taxable gift only as to the amount of the excess of value of her transfer over and above what she received under the terms of the will]; United States v. Past, supra. Because the District Court's decision is inconsistent with the holding

of this Court in United States v. Past, supra, its decision must be reversed and the case remanded for further proceedings in accordance with controlling principles of law.

Dated: San Francisco, California
January 6, 1966.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

_____
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Attorney for Appellant